

REMARKS/ARGUMENTS

Upon entry of the proposed amendment, Claims 1, 5, 9, 12, 16 and 17 will be amended, Claims 2-4, 10, 11 and 15 cancelled. Independent Claims 1 and 9 with Claims 5, 8, 12 and 16-18 depending therefrom, all read on the elected species of Figs. 2-4, 9 and 12, and will remain for consideration. Claims 6, 7, 13 and 14 are withdrawn from consideration as being drawn to a non-elected species, however it is requested that these claims be rejoined with any allowed generic claim from which they depend.

In the recent Office Action the Examiner objected to Claim 15 as being indefinite. Applicant has canceled Claim 15, thus obviating this objection to the Claim.

In the Final Office Action the Examiner rejected Claims 1, 5, 8-12 and 15-18 under 35 U.S.C. § 103(a) as being unpatentable over Brema et al. (US 4,498,660) in view of Elflein et al. (US 3,363,368).

In an effort to reduce the number of issues for consideration, Applicant has canceled dependent Claims 4, 10 and 11, the subject matter of Claims 10 and 11 having been incorporated into independent Claim 9. Independent Claim 15 has been cancelled as well. Applicant has further amended the remaining claims to more clearly and definitely recite the

elected species of Applicant's invention, and will advance arguments hereinbelow to illustrate the manner in which the presently claimed invention is patentably distinguishable from the applied and cited prior art. Reconsideration of the present application is respectfully requested.

The patent to Brema et al. discloses a modular fence structure having fence panels 1, which are made up of a series of stacked rail members 2. Each rail member has a pair of integral connectors 3(a), 3(b). Each connector is comprised of a tubular member with a substantially cylindrical opening 8 therethrough. The connectors are staggered with respect to the ends of each rail and are stacked one above the other around a fence post 9(a), (b) or (c), with the cylindrical opening 8 engaging the post. This stacking of the connectors and the rails 2 forms the fence panels 1. This stacking of rail members allows Brema et al. to construct fence panels of various heights. The patent to Elflein et al. discloses a means of connecting adjacent elements such as slabs or panels by force fitting or sliding of the connectors. The connectors have claw-like projections 4 for inter-engagement. The inner surfaces of the projections 4 form a hollow space in which a coupling element 3 can be introduced. The Examiner believes that it would have been obvious to modify the fence panel connectors of Brema et al. to have mating connections forming a cavity therebetween as taught by Elflein et al., with a coupling element or tube within the cavity.

Applicant does not agree with the Examiner's conclusions. There appears to be no teaching or suggestion in the applied prior art references to Brema et al. and Elflein et al. to modify the Brema et al. reference in the manner urged by the Examiner, absent that which is found in Applicant's own disclosure. In this regard, the Brema et al. fence panels are comprised of a plurality of individual rails so that each panel may be constructed according to a desired height, and to provide for a pivoting connection around the fence post so that the fence may extend at a variety of angles. The connectors at the first end of each first panel of Brema et al. are staggered with respect to the connectors of the first end of a second panel. Thus, the connectors are on top of each other, are not located at similar heights, and are unavailable for sliding, interlocking connection because of their staggered, stacking arrangement. The connectors do not interlock with one another, but interlock with fence post 9. To modify the Brema et al. patent by providing mating connections and post receiving slots forming a cavity therebetween similar to what is shown in Elflein et al., as the Examiner urges, would require the destruction of the Brema et al. reference. The connectors of Brema et al. would have to be relocated so that they are the same levels, and the fence panels of Brema et al. would no longer be angularly adjustable since the connectors of Elflein et al. do not provide for pivoting or angular adjustment, and in fact prohibit it. However, if a proposed modification would render the prior art invention being modified unsatisfactory for its intended purpose, then there is no suggestion or motivation to make the proposed modification. *In re Gordon*, 733 F.2d 900, 221 USPQ 1125 (Fed. Cir.

1984). See MPEP§ 2143.01(V). Additionally, neither Brema et al. nor Elflein et al. teaches or suggests pairs of substantially identical slidingly interlocking connector projections and slots, or slidingly interlocking first and second attachment structures on the first ends of the first and second panels as recited in Applicant's claims. Since these features are not taught or suggested by Brema et al. and Elflein et al., and as noted above the teachings of Elflein et al. simply do not suggest to one of ordinary skill in the art to modify the connection structure of Brema et al. as the Examiner proposes, the rejection under 35 U.S.C. § 103(a) based on Brema et al. and Elflein et al is improper and should be withdrawn.

Obviousness is tested by "what the combined teachings of the references would have suggested to those of ordinary skill in the art." In re Keller, 642 F.2d 413, 425, 208 USPQ 871, 881 (CCPA 1981). But it "cannot be established by combining the teachings of the prior art to produce the claimed invention, absent some teaching or suggestion supporting the combination." ACS Hosp. Sys., Inc. v. Montefiore Hosp., 732 F.2d 1572, 1577, 221 USPQ 929, 933 (Fed. Cir. 1984). As noted above, there is nothing in the teachings of the relied upon prior art references which would have suggested the desirability, and thus the obviousness of the Examiner's modifications of the modular fence structure of Brema et al. It is only by impermissible hindsight and reliance on Applicant's own disclosure that the Examiner would have been led to reconstruct the Brema et al. modular fence structure, so as to derive Applicant's claimed barrier system from the applied teachings. It is therefore

Applicant's conclusion that the combined teachings of Brema et al. and Elflein et al. fail to establish a *prima facie* case of obviousness.

The remaining patents made of record in the application but not applied against any of the claims have also been carefully reviewed, however, Applicant finds nothing therein which would overcome or supply that which is lacking in the basic combination of the other applied prior art noted above.

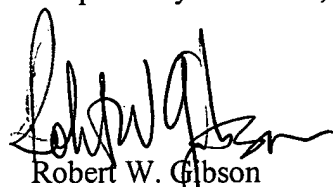
Applicant respectfully submits that the proposed amendments made herein properly respond to the outstanding Final Rejection and represent a *bona fide* effort to satisfactorily conclude the prosecution of this application. Care has been exercised to insure that no new matter has been introduced and that no new issues have been raised that would require further consideration or search. It is felt that no inordinate amount of time will be required on the part of the Examiner to review and consider this amendment. Applicant respectfully requests entry and favorable consideration of the proposed amendment. In the event that the application is not allowed, it is requested that this amendment be entered for purposes of appeal.

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For the foregoing reasons, Applicant respectfully submits that the present application is in condition for allowance. If such is not the case, the Examiner is requested to kindly contact the undersigned in an effort to satisfactorily conclude the prosecution of this application.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Robert W. Gibson', with a stylized flourish at the end.

Robert W. Gibson
Litman Law Offices, Ltd.
Registration No. 57,145
(703) 486-1000

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